1992

# Provo River Water Users' Association, a Utah corporation; and the United States of America v. Robert L. Morgan, State Engineer of the State of Utah; and Kamas Hills Ltd., a Utah limited partnership : Brief of Appellee

Utah Supreme Court

BRIEF

IN THE UTAH SUPREME COURT

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| PROVO RIVER WATER USERS' ASSOCIATION, a Utah corporation; and THE UNITED STATES OF AMERICA,<br>Appellants,<br>v.<br>ROBERT L. MORGAN, State Engineer of the State of Utah; and KAMAS HILLS LTD., a Utah limited partnership,<br>Appellees. | No. 920069<br>Priority 15 |

**BRIEF OF APPELLEE UTAH STATE ENGINEER**

Appeal from a Judgment of the Third Judicial District Court of Summit County, Honorable Homer F. Wilkinson

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PROVO RIVER WATER USERS' ASSOCIATION,
a Utah corporation; and THE UNITED STATES OF AMERICA,

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v.

ROBERT L. MORGAN, State Engineer of the State of Utah;
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# BRIEF OF APPELLEE UTAH STATE ENGINEER

## JURISDICTION

The Utah Supreme Court has exclusive jurisdiction of this appeal pursuant to Utah Code Ann. § 78-2-2(3)(f).

## ISSUES PRESENTED FOR REVIEW

A. Given Utah law as it existed in 1935 (both statutory and caselaw), did the general water adjudication on the Weber River--which culminated in the 1937 "Weber River Decree"--adjudicate or bar subsequent claims to the use of isolated springs and/or percolating groundwater?

Standard of Review. This is an issue of law to be reviewed for correctness (Blake v. Hansen, 782 P.2d 472, 474 (Utah 1989)).

B. Whether the trial court's finding that the isolated unnamed springs percolating on Appellee Kamas Hills Ltd.'s property are not and have not been "directly tributary to the Weber River

System" as defined in the Weber River Decree is clearly erroneous.

Standard of Review. The trial court's factual findings are reviewed by this Court under the "clearly erroneous standard" of Utah R. Civ. P. 52(a) (Eskelsen v. Town of Perry, 819 P.2d 770, 771 (Utah 1991)). The evidence is surveyed in the light most favorable to the findings (College Irr. Co. v. Logan River and Blacksmith Fork Irr. Co., 780 P.2d 1241, 1244 (Utah 1989)).

C. Whether the trial court's finding that Appellants' evidence did not establish that the percolating waters from isolated springs on Kamas Hills Ltd.'s property "definitely make their way into the Weber River" is clearly erroneous.

Standard of Review. The trial court's factual findings are reviewed by this Court under the "clearly erroneous standard" of Utah R. Civ. P. 52(a) (Eskelsen v. Town of Perry, supra at 771)). The evidence is surveyed in the light most favorable to the findings (College Irr. Co. v. Logan River and Blacksmith Fork Irr. Co., supra at 1244 (Utah 1989)).

## REFERENCES TO THE RECORD ON APPEAL

References herein to the record on appeal are as follows:

"R. ___" -- trial court's file, including all pleadings and documents filed with the court.

"Tr. Vol. ___, p. ___" -- trial transcript. Volume 1 is testimony taken on September 26, 1991; Volume 2 is testimony taken on September 27, 1991; and Volume 3 is the trial court's oral findings of September 27, 1991.

"Exh. ___" -- trial exhibit.

## STATEMENTS OF CASE AND FACTS

Appellee Utah State Engineer hereby adopts and incorporates the Statement of Case and the Statement of Facts set forth in the brief of Appellee Kamas Hills Ltd.

## SUMMARY OF ARGUMENT

While this action arose out of an appeal of the State Engineer's approval of a change application filed by Appellee Kamas Hills Ltd., the "guts" of this case involve the validity of diligence claims to certain isolated springs on which the change application was based.

Appellants take the position that since the specific rights set forth in Kamas Hills Ltd.'s diligence claims were not specifically mentioned or addressed in the "Weber River Decree" (the 1937 Decree in the general adjudication action on the Weber River), such rights are cut off and barred by that Decree. We disagree.

While it is generally true that a general adjudication action will bar claims to water not asserted in such an adjudication, that is not true in all cases--especially where a general adjudication action did not or could not purport to adjudicate a particular class of water rights.

Appellants seek to superimpose the present state of water law on the 1921 general adjudication action regarding the Weber River, and the shoe simply does not fit. Our position is that under the statutes and caselaw governing water rights prior to 1935, isolated springs and/or percolating groundwater were not treated as public

water subject to the appropriation process. Such water sources were considered to be owned as a part of the land. Prior to 1935, only surface waters or waters in defined channels were considered as "public" and subject to the prior appropriation doctrine.

Under the statutes governing general water adjudications in effect when the Weber River Adjudication was being litigated, only these appropriation or public rights were subject to adjudication. That is why not one underground water right was awarded or even addressed in the Weber River Decree. Under that adjudication, only water rights in the Weber River itself, or which were surface tributary thereto, were subject to adjudication. It is not so much a question of whether or not the Decree is or is not ambiguous. The key to this case is whether the law as it existed during the Weber River Adjudication contemplated that non-surface tributary sources were or could have been adjudicated, and whether the isolated springs here in question were surface tributary to the Weber River (Appellants have conceded that they were not surface tributary).

It should also be noted that the water rights claimed by Appellee Kamas Hills Ltd. are not the only rights which will be affected by this Court's decision. There are virtually hundreds of diligence claims in the Weber River Drainage that will be impacted by this Court's decision under the doctrine of stare decisis.

## ARGUMENT

### PREFACE

While the State Engineer is in agreement with the brief of our Co-Appellee Kamas Hills Ltd., we feel compelled to file a separate brief in this matter to advise the Court as to the specific concerns of the State Engineer regarding Appellants' action. These concerns relate more generally to the evaluation of diligence claims now or hereafter filed with the State Engineer within the Weber River Drainage--particularly in the context of change applications based on such diligence claims.

We firmly believe that Appellants' intent in filing this action is to obtain a court adjudication from which they will then argue that all water diligence claims on springs in the Weber River System filed after the Weber River Decree (and not covered therein) are void because they are barred by said Decree. Appellants also seek a judicial declaration that the State Engineer does not have the authority to evaluate or approve (or even to accept for filing) change applications based on diligence claims in the Weber River Drainage (R. 4). This, of course, causes the State Engineer a great deal of concern.

Further, there are literally hundreds of diligence claims within the Weber River drainage area covered by the Decree. While none of these other water users are parties to this action, the result sought by Appellants in this action will detrimentally affect these other rights.

Hence, while we fully support Appellee Kamas Hills Ltd.'s efforts to defend their specific diligence claims and the State Engineer's approval of the change application based thereon, we feel it necessary to file this separate brief to address more general concerns.

## POINT I: THE WEBER RIVER DECREE DID NOT PURPORT TO ADJUDICATE ISOLATED SPRINGS OR UNDERGROUND SOURCES FEEDING THE WEBER RIVER SYSTEM

### A. Introduction

Let there be no mistake as to Appellants' intentions in bringing this action. On its face, the Complaint seeks a reversal of the State Engineer's decision granting the change application of Appellee Kamas Hills Ltd., and further seeks a declaration that the diligence claims on which the change is based are barred by the Weber River Decree (R. 3). The actual amount of water involved is quite small. We believe Appellants' real intention is to obtain a ruling which would indirectly invalidate all diligence claims within the area covered by the Weber River Decree.

In a nutshell, the position of the State Engineer is that the Weber River Decree did not purport to adjudicate isolated springs or underground water sources which were not directly surface tributary to the "Weber River System" as defined in the Decree. Further, the 1919 general adjudication statute did not cover such rights. If a source of water is surface tributary, we concede that it would have been cut off by the Decree. If it is not surface tributary, the Decree would have no effect on such rights. We believe that in evaluating the numerous diligence claims in this

area--especially in the context of change applications--each claim should be examined on a case-by-case basis to determine whether or not it is surface tributary, and thus affected by the Decree.

This point will explain why we feel the Decree did not cover sources of water such as the isolated springs claimed by Kamas Hills Ltd. We will discuss the Decree, the uncertainties in the law that existed at the time the Decree was entered, and other relevant factors.

Finally, we feel that water rights such as those of Kamas Hills Ltd.--which have been used for many years and which were purchased in good faith as a part of the property--should not be invalidated lightly, and only upon a clear demonstration that the Weber River Decree is a bar to such claims.

B. The Weber River Decree

The initial action leading up to the Weber River Decree was filed on January 18, 1921, as Plain City Irrigation Co. v. Hooper Irrigation Co., (Weber County Civil No. 7487). It was immediately converted to a general adjudication action in 1921, pursuant to statute (Laws of Utah 1919, Ch. 67, § 20 et seq.), but retained its original case title. The final Decree was entered on June 2, 1937.

For reasons not relevant here, not all of the tributaries of the Weber River were included in the adjudication action. Water rights on the Ogden River above its confluence with the Weber River, and all tributaries "which flow into" the Weber River below that confluence were excluded (Weber River Decree, p. 10, ¶ 2, Exh. 30; Appendix A hereto).

Thus, the court had to define those geographic portions of the Weber River which were and were not being adjudicated. The area being adjudicated was referred to in the Decree as the "Weber River System". However, it is critical to note that the word "System" merely referred to the geographic drainage--and not to the hydrologic "system" feeding the River (this will be discussed in more detail below).

Thus, in defining the portions of the Weber River which were or were not included, the court specifically referred to "tributaries" (see Appendix A, ¶ 2). The term "Weber River System" itself denotes surface water tributaries: i.e., all surface water "flowing" to the Weber River or its tributaries. Appellants concede that the springs in question here are not surface tributary to the Weber River (Appellants' Brief, p. 6), and it is our contention that under the pre-1935 law such sources were not intended to be--nor were they--adjudicated.

It is also clear that on its face the Decree did not purport to adjudicate any underground sources of water such as wells. Not one award of an underground source of water is found in the Decree.[1]

Other references in the Decree itself support our contention that it covered only surface tributaries.

1. Paragraph 7, at pages 11 and 12 of the Decree (attached hereto as Appendix A) defines the terms used in awarding the

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[1] After legislative amendments to the water code in 1935, general adjudication actions now include both surface and underground sources.

various water rights in the heart of the Decree itself. The rights awarded were defined in terms of "Flood" "High" and "Low" flows. Such words are used in water jargon exclusively in terms of surface flows in watercourses.

2. It is uncontroverted that the Kamas Hills Springs are not surface tributary to the Weber River System (Appellants' Brief, p. 6). Again, paragraph 7 of the Decree contains some interesting language. For example, subparagraph (a) deals with the distribution of "Low Flow" rights under the Decree. The relevant portion of subparagraph (a) reads:

> . . . the owners of said low water rights are entitled to use and have distributed such quantities of water available for use in such periods of low flow water as set out in subparagraph 8-A hereof, except as to certain rights, which are modified by [certain enumerated paragraphs] hereof, and except as to any other rights to the use of water, the water to fulfill which is from springs or tributaries, which if shut off from supplying them [the Decreed rights], would not reach, and could not be beneficially used by any owner of the right to use water, whose right is prior in point of time.

(Emphasis added; see Appendix A). Identical language is included in subparagraphs (b) and (c) of paragraph 7, which deal with "High" and "Flood" flows, respectively.

The above-quoted language is significant in that it recognizes and makes provision for springs and other tributaries that do not contribute to the surface flow of the Weber River. Such language strongly supports our contention that the Weber River Decree purported only to deal with water sources that were directly surface tributary to the River or its tributaries. Even as to surface tributary rights, the court is saying that a junior

appropriator will not be shut off if his water source--if left alone--would not reach the River on the surface and become part of the supply for downstream senior appropriators.

Further, the above-quoted limitation is not just applicable to rights adjudicated in the Decree. The court uses the term "any other rights to the use of water" in describing the exception. This limitation is also in keeping with the general proposition of law to the effect that an upstream junior user will not be forced to shut off if the water in question will not reach the downstream senior users' points of diversion. See, e.g., Fuller v. Sharp, 33 Utah 431, 94 P. 813 (1908); Fenstermaker v. Jorgensen, 53 Utah 325, 178 P. 760 (1919); Washington v. Oregon, 297 U.S. 512, 522-523, 529 (1936); Mitchell Irr. Dist. v. Whiting, 59 Wyo. 52, 136 P. 502 (1943), cert. den. 322 U.S. 727 (1944); and Hutchins, Water Rights Laws in the Nineteen Western States, Vol. 1, pp. 579-580 (1971).

Since it is conceded that the Kamas Hills Springs are not surface tributary to the Weber River System, Paragraph 7 of the Decree itself makes the Decree irrelevant so far as the rights of Appellants--and also of Appellee Kamas Hills Ltd.--are concerned. Further, the provisions of Paragraph 7 add strong weight to the argument that the Decree itself did not purport to adjudicate isolated springs not directly surface tributary to the River.

In its Findings of Fact, the lower court found "that the Weber River Decree is not ambiguous as far as it goes", but the court also found that the Decree does not extend as far as Appellants' claims in this matter (Finding of Fact No. 15, R. 419; Emphasis

added). While we fully agree with this statement, this finding may be slightly misleading. The Decree itself is not ambiguous as to the rights it awarded. But, as will be shown in the next subsection, the ambiguity or uncertainty relates to what water sources were adjudicated by the Decree because of the confused status of Utah's water law at the time the Decree was adjudicated.

C. Uncertainty of Utah Water Law at the Time the Weber River Adjudication was Begun and Adjudicated

Our position is that the Weber River Decree did not purport to adjudicate isolated springs or underground water sources, and that the Kamas Hills Springs do not fall within the category of water rights so adjudicated. In sum, this and the following subpoints will discuss: (1) the uncertainty of Utah water law during the pendency of the action resulting in the Weber River Decree; (2) the general adjudication statutes in effect at that time purportedly only covered "appropriative" rights and that Kamas Hills Ltd.'s claims were not initiated as appropriative rights; (3) that because of the uncertainty of the general water laws and the adjudication statutes, the predecessor of Kamas Hills Ltd. could not have had valid notice of whether the rights in the Kamas Hills Springs were being adjudicated. In fact, we will demonstrate that even the State Engineer was uncertain and issued a disclaimer to that effect in his Proposed Determination of Water Rights submitted to the court.

In light of these factors, Appellants' assertion that the Weber River Decree foreclosed all types of claims to water use in the Weber River System simply cannot stand.

1. Utah Water Law Prior to 1935

As stated above, the Weber River Adjudication was begun and converted to a general adjudication action in 1921, and the Decree was entered in 1937. Major changes in Utah's water law--both statutory and caselaw--were occurring during the pendency of the Weber River Adjudication. While it is difficult to trace all of the history involved in the space limitations of this brief, we will give it a shot.

Attorneys and judges today are accustomed to thinking of all water in Utah (both surface and underground) as being the property of the public. Indeed, that is what the present statute declares. See § 73-1-1, Utah Code Ann. Further, we have come to accept that appropriation of this public water to a private use may only be accomplished through filing an application to do so with the State Engineer. See § 73-3-1, Utah Code Ann.

But that was not always the case. Under early Utah law, not all waters were considered "public". See, e.g., Riordan v. Westwood, 115 Utah 215, 203 P.2d 922, 924-28 (1949). Certain water sources were considered to be "private" as a physical attribute of the land and, as such, were not deemed subject to appropriation. In other words, certain water sources were deemed to be owned by the landowner and he or she did not have to appropriate the water from the State. The law in this area began active evolvement

around the turn of the century and culminated in 1935 (two years prior to the final Weber River Decree) with a statutory amendment and the case of Wrathall v. Johnson, 86 Utah 50, 40 P.2d 755 (1935).

But, let us start at the beginning with springs, since that is what is at issue in this action. Early Utah caselaw recognized basically two types of springs. The first are springs which flow in such amounts or under such conditions that the waters therefrom form a watercourse or "spring creek" which is directly tributary to a river system on the surface.[2] As to these types of springs, there is no doubt that they constitute a surface, tributary source of supply and have therefore always been owned by the public and subject to the laws of appropriation; and downstream users on the river are entitled to rely on such springs as a source of supply. Bastian v. Nebeker, 49 Utah 390, 163 P. 1092 (1916).

However, there is another type of spring--of which the Kamas Hills Springs are an example. These are springs which issue from the ground, flow a short ways on the surface, and again sink into the ground without ever reaching any watercourse which is tributary to a larger surface drainage system.

The early rule adopted by this Court was that if such a spring arose on private property and disappeared before it left the property, it was owned by the owner of that land and was not

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[2] The Court may be familiar with Cascade Springs above Heber Valley, which form the major source of flow in Little Deer Creek--which is a perennial flowing stream entering the Provo River just below Deer Creek Dam in Provo Canyon.

subject to appropriation by others. Or, stated differently, the owner of the land did not need to appropriate the water from the State, since he or she owned it as a part of the land. Willow Creek Irr. Co. v. Michaelson, 21 Utah 248, 60 P. 943 (1900); and Peterson v. Eureka Hill Mining Co., 53 Utah 70, 176 P. 729 (1918).[3] In Deseret Livestock Co. v. Hooppiania, 66 Utah 25, 38, 239 P. 479 (1925), this Court stated: "The waters of the springs are therefore percolating waters and if such springs are located on private lands the waters arising therefrom are not subject to appropriation."[4]

The caselaw at that time in other Western States was generally in accord. See Jones v. McIntire, 66 Idaho 338, 91 P.2d 373 (1939); Macher v. Gentry, 67 Idaho 559, 186 P.2d 870 (1947); Southern Pac. R.R. v. Dufour, 95 Cal. 613, 30 P. 783 (1892); York v. Horn, 154 Cal.App.2d 209, 315 P.2d 912 (1957); White v. Rose Land & Cattle Co., 61 Colo. 352, 157 P. 1164 (1916); Haver v. Matonock, 79 Colo. 194, 244 P. 914 (1926); and Beisell v. Wood, 186 Or. 66, 185 P.2d 570 (1947). The most recent treatise on water law states the old rule as follows: ". . . . spring water that did not create a stream or contribute water to a stream was treated as diffused surface water which could not be appropriated." Waters and Water Rights, Michie Company, Vol. 2, § 13.02(C)(2) (1991 Edition).

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[3] A slightly different rule applied to such springs located on the public domain. See, Patterson v. Ryan, 37 Utah 410, 108 P. 1118 (1910).

[4] Whether or not such waters were subject to the appropriation process is critical when we examine the nature and extent of the 1919 General Adjudication statutes, infra.

A similar rule of private ownership applied to percolating groundwater prior to the 1935 statutory amendments. Originally, the Utah courts applied appropriation law only to definite underground streams and the underflow of surface streams (the water flowing immediately below the surface of defined watercourses). Chandler v. Utah Copper Co., 43 Utah 479, 135 P. 106 (1913). However, percolating groundwater in aquifers was considered to belong to the owner of the soil as part of his or her ownership of the land. Willow Creek Irr. Co. v. Michaelson, supra. In the early 1920's, the doctrine of correlative rights was judicially adopted, entitling each landowner to use percolating groundwater in proportion to his surface ownership of land. See Horne v. Utah Oil Refining Co., 59 Utah 279, 202 P. 815 (1921). However, the right to use percolating groundwater was still considered to be a private right, not subject to the laws of appropriation.

In 1935, this Court abandoned the correlative rights doctrine and ruled that percolating groundwater was subject to the appropriation doctrine. See Wrathall v. Johnson, supra. That same year, the legislature passed the water code amendments (currently codified as § 73-3-1) providing that groundwater could only be appropriated by filing an application with the State Engineer. A recent treatise on water law discusses the uncertainty caused by the 1935 shift in Utah's water laws:

> When the Utah Supreme Court abandoned the correlative rights rule, they needed the promptly forthcoming help of the Utah Legislature. Even so, much subsequent litigation has been forthcoming concerning appropriations made

> in groundwater prior to 1935 when no one could have known, if they relied on then current Utah law, that appropriative rights could be established in groundwater.

(Waters and Water Rights, Michie Company, Vol. 3, § 24.01(a) at p. 397 (1991 Edition); Emphasis added). See also Hanson v. Salt Lake City, 115 Utah 404, 205 P.2d 255 (1949). The uncertainty these developments caused among attorneys is clearly demonstrated by two articles in the old Utah Bar Bulletin. See: Ullrich, Underground Water Rights in Utah, Utah Bar Bulletin, Vol. VI, No. 7, p. 93 (July 1936), and Skeen, Recent Amendments to Utah Water Laws, Utah Bar Bulletin, Vol. XII, Nos. 1 & 2, p. 1 (Jan.-Feb. 1942).

We mention percolating groundwater to demonstrate that the Utah laws regarding both non-tributary springs and percolating groundwater were all in a state of flux just prior to 1935 and right in the middle of the Weber River Adjudication process. The uncertainty this created for water users in the Weber River System will be discussed in more detail below. Further, we see no appreciable difference between percolating groundwater and springs such as the Kamas Hills Springs, which may be part of the general groundwater system feeding the Weber River--although geologic conditions may cause the groundwater to flow on the surface at a certain point for a short distance (see, generally, Testimony of Bryce Montgomery, Tr. Vol. 2, pp. 47 et seq.).

2. The 1919 General Adjudication Statute

As stated above, the Weber River Adjudication was converted from a private action to a general adjudication action in

1921. As such, the adjudication was subject to the general adjudication statutes then in effect (Laws of Utah 1919, Ch. 67, §§ 20-40). That law was enacted in 1919, and a copy is attached hereto as Appendix B.

In the preceding sub-point, we have demonstrated that the laws on non-tributary springs and percolating groundwater as they existed in the 1920's provided that such water sources were not subject to the law of appropriation--but rather were treated as private rights in those water sources. The 1919 general adjudication statute is relevant because at that time the general adjudication process only applied to appropriative water rights and not to any water rights held privately as a part of land ownership.

To be sure, the 1919 law does not expressly say that only appropriative rights are covered, but a reading of key sections of that law makes that intent clear. For example, § 23 provides for the service of notice on water users. Such notice has the same effect as a summons. Section 23 provides in part:

> The clerk of said court shall . . . mail, by registered letter to each [claimant] as are known, a copy of said notice, and a blank form on which said claimant shall present in writing . . . all the particulars relating to the appropriation of the water of said river system or water source to which he lays claim.

(Appendix B, p. B-8; Emphasis added).

Section 24 of the 1919 law sets forth the form and information to be provided to the court clerk. That information is to include: "the nature of the use on which the claim of appropriation is based . . . ." (Emphasis added).

Thus the statute clearly contemplated that notice was only to be given to those water users claiming appropriative rights--and did not include those claiming rights to use water under private rights recognized under the then existing laws.

At best, the 1919 statute only authorized the adjudication of appropriative water rights, and did not grant the Courts jurisdiction to address claims to water based on land ownership where it was not necessary to appropriate the water. At the very least, the 1919 statute (given the state of the then-present law relating to non-tributary springs and percolating waters) could have created a very real uncertainty in the minds of water users as to whether they were or were not obligated to file a claim with the clerk in order to preserve a private non-appropriative claim to water.

We will now proceed to discuss the actual uncertainties these laws created at the time the Weber River Adjudication was begun.

D. Uncertainty by the State Engineer

Aside from any uncertainty in the minds of water users, the State Engineer himself was unclear as to whether certain water sources within the geographical area of the "Weber River System" should be included in the adjudication.

Sections 28 and 32 of the 1919 general adjudication statute (Appendix B hereto) provide that upon receipt of water user's claims, the State Engineer is to tabulate the claims, conduct surveys and investigations as necessary, and prepare a "Proposed Determination" of water rights for consideration by the court.

This was done by the State Engineer, and hydrographic maps detailing claimed sources and irrigated acres were prepared.

On August 1, 1924, the State Engineer submitted his Proposed Determination to the court and to the water users. In Section VIII of the Proposed Determination (Exh. 39, p. 263; copy attached hereto as Appendix C), the State Engineer stated:

> Certain lands in this State have enjoyed some benefits from the application of water thereto by other than diversion from natural channels or sources, such for instance, as natural swamps or meadow lands watered from over flow, seepage water, etc.
>
> The Statutes appear not to point the way sufficient to enable the State Engineer certainly to determine water rights with respect to these classes of lands and no determination, therefore, is made with respect to them. The tabulation separately shown hereafter shows facts as to these lands and water uses, such as dates of priority, points of collection, general location and such other data as may enable the court to determine the status of these uses.

(Emphasis added). Thus, the State Engineer himself was confused as to whether certain water sources should be included in the Decree, and he chose to make no determination as to those rights.[5]

The testimony of Edwin J. Skeen, who was the attorney for the State Engineer from 1936 to 1945, established that the State Engineer--for the period immediately after the Decree was entered--

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[5] The Weber River Decree makes no declaration as to whether the questionable water sources were considered to be adjudicated. And as pointed out by Appellants (see Appellants' Brief, p. 5, n. 1), the records of the court proceedings leading up to the Weber River Decree have unfortunately been lost or misplaced without being microfilmed. It is therefore impossible to ascertain the trial court's final disposition with regard to the adjudication of the types of sources identified in § VIII of the Proposed Determination.

interpreted the Weber River Decree as not covering isolated springs in the Weber River Drainage (Tr. Vol. 1, p. 167).

Of further note is that the adjudication map prepared by the State Engineer for the Weber River Adjudication covering the area of the Kamas Hills Springs is in evidence (see Adjudication Map No. 47, Exh. 29; Tr. Vol. 1, pp. 193-94). That map--as others in the adjudication mapping process--was a result of the State Engineer's surveys to determine sources of water and irrigated acreage (see §§ 22 and 28 of the 1919 general adjudication statute attached hereto as Appendix B, pp. B-8 and B-10). On that map, no irrigated acreage or water sources whatsoever are shown on the Kamas Hills Ltd. property above the so-called Upper Marion Ditch (see Testimony of Jim Riley, Tr. Vol. 1, p. 194). While no definitive conclusions can be drawn from the absence of any survey above the Upper Marion Ditch, it is at least conceivable that the reason the area was not surveyed is because the State Engineer may have known the Kamas Hills Springs were there but did not consider them to be part of the adjudication; or, that the State Engineer or his surveyor simply was unaware of the location of the springs.

**E.** <u>Uncertainty for Water Users of Isolated Springs</u>

Perhaps the most important point is what was in the minds of the many water users of isolated springs when the Weber River Decree was adjudicated. These people were, in retrospect, placed in a difficult position as to whether they had to file a claim in the Weber River adjudication in order to preserve it.

As to users of wells or other underground sources of water, it is clear that underground water rights were not being adjudicated. To the best of our knowledge, nothing in the Decree so indicated--nor are any underground rights awarded in the Decree or mentioned in the State Engineer's Proposed Determination. But it was not so easy for users of isolated springs which were not surface tributary to the Weber River System.[6]

In this respect, we would ask the Court to try and place itself in the mind of a water user of an isolated spring in the early 1920's. Perhaps you received a notice from the court clerk. Perhaps you did not, but read the notice of the action in the newspaper. But the law at that time (e.g., Deseret Livestock v. Hooppiania, supra) stated that you privately owned any spring on your land that seeped back into the earth before it left your property. You and your precedessors always used the spring for irrigation, culinary or stockwatering purposes. You never made application to the State Engineer to use the water, and probably nobody ever questioned your right to use the water.

Since, under the existing law, you owned the water outright (as opposed to obtaining the right to use the State's water), you would not be subject to other rights in the system. Priority dates would be irrelevant because downstream users were not entitled to rely on your spring as a specific source of supply since it was not

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[6] Because the Weber River Decree court records are lost or misplaced (see n.5, supra), it is impossible to determine if any individual filed a claim which the court disallowed, or whether no claim was filed.

surface tributary. This type of private water right simply did not fit into the prior appropriation system according to the law.

Perhaps you went to Salt Lake City and read the general adjudication statute (Appendix B hereto). And it said that the general adjudication process applied only to appropriative rights. WOULD YOU HAVE FILED A CLAIM? Maybe, maybe not. The point is that in the 1920's the law--both as to appropriative versus private rights and the statute itself--created legitimate doubts as to whether or not such rights were covered by the general adjudication process. Our position is that because of that legitimate uncertainty, rights such as those of Kamas Hills Ltd. should not be deemed to be barred by the Decree simply because the Decree is "there" and the right is not included therein.

It also makes sense that after the laws were changed in 1935 declaring <u>all</u> waters to be public and subject to the appropriation doctrine, the owners of isolated springs would avail themselves of the diligence claim statute enacted in 1943 (§ 73-5-13) to document their claims with the State Engineer.

But, you say, Appellants produced evidence at trial that many users of isolated springs did indeed submit claims on "isolated springs"[7] and those rights were included in the Decree.

Our response to that again demonstrates the uncertainties existing at that time. It seems reasonable that some users of isolated springs may have been more cautious than others--or

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[7] However, there was no concrete evidence that any of these other springs were or were not surface tributary to the Weber River System.

perhaps they or their attorney had a different legal interpretation of Utah law as it then existed. It is undisputed that some users of springs filed claims and some did not. Those claims that were filed were generally included in the Decree.[8] But it does not logically follow that just because some overly cautious water users filed claims, those who did not file claims had their rights cut off by the Decree. The number of diligence claims on file with the State Engineer which were not included in the Decree is just as persuasive that such rights were not intended to be adjudicated. At trial, computer print-outs from the State Engineer's office were introduced showing that there are hundreds of diligence claims on file with the State Engineer in the Weber River System that are not recognized in the Decree (see Exhs. 32, 33 and 34; Tr. Vol. 1, p. 201; see also Testimony of Stanley Green, Tr. Vol. 2, p. 45).

At this point it seems appropriate to discuss briefly the effect of this action on the multitude of other diligence claims listed in Exhibits 32-34. The owners of these claims are not parties to this action, and technically are not bound by any judgment herein. However, if this Court were to adopt Appellants' theory that as a matter of law the Weber River Decree constitutes a bar to all later diligence claims in the Weber River System (see Appellants' Brief, p. 1, Issues Presented for Review), the effect would be to render all these other claims invalid for all practical purposes under principles of stare decisis.

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[8] This is so regardless of the fact that the 1919 general adjudication statutes may not have conferred jurisdiction to adjudicate such claims. See discussion supra, at pp. 16-18.

Further, to adopt Appellants' argument that all such diligence claims are barred by the Weber River Decree would, in effect, preclude the State Engineer from approving any change applications based on such diligence claims. This is exactly what Appellants want and is--we submit--the real reason they filed this lawsuit (see Complaint, R. 1-9). The trial court did not believe the Weber River Decree went that far, and we don't either.[9]

In conclusion, a claim to water rights should not be invalidated lightly. In view of the state of the law which existed at the time the Weber River Adjudication was being prosecuted, and absent any specific language in the Decree that all claims on non-tributary isolated springs were being adjudicated, we urge that the diligence claims should be given the benefit of the doubt and upheld--especially since § 73-5-13, Utah Code Ann., provides that diligence claims filed with the State Engineer are prima facie evidence of the right.

POINT II: THE TRIAL COURT WAS CORRECT IN FINDING THE SPRINGS IN ISSUE WERE NOT TRIBUTARY TO THE WEBER RIVER, AND IF ANY ERROR DID OCCUR IT WAS HARMLESS

Appellants argue that the trial court erred in concluding that the evidence was insufficient to show that the waters of the Kamas Hills Springs were tributary to the Weber River System. We disagree. As demonstrated in Point I above, we believe the sole issue in this case is whether the diligence claims of Kamas Hills

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[9] Should the Court nevertheless agree with Appellants, we would respectfully suggest that the Court expressly limit the precedential effect of the decision to this case only.

Ltd. are or are not barred by the Weber River Decree. As to that issue, we believe (for the reasons set forth above) that the only relevant factual issue is whether the springs in question were surface tributary to the Weber River or its tributaries. Since Appellants have conceded this fact, (see Appellants' Brief, p. 6), there is no point in rehashing the uncontroverted testimony of virtually all the technical witnesses that the springs were indeed not surface tributary. The trial court expressly found in its oral ruling that there were no surface channels from the springs to the Weber River (Tr. Vol. 3, p. 5).

However, Appellants insist that once the spring water seeps back into the ground (which every technical witness said it does), it becomes part of the underground percolating flow that eventually may find its way to the Weber River. While there is some general evidence that this takes place, there is certainly no specific evidence in the record as to how, when, or where it occurs. However, for the purposes of this argument, we will assume, arguendo, that after seeping back into the ground the waters of the Kamas Hills Springs do eventually find their way through underground percolation to the Weber River. But that fact--even if true--doesn't help Appellants one iota. They continue to ignore Utah water law as it existed prior to 1935--that percolating groundwater was not subject to the appropriation doctrine.

Appellants argue in Point II of their brief that just because the Kamas Hills Springs make a brief appearance on the surface they were intended to be covered by the Weber River Decree. That is not

correct. In Point I above, we demonstrated that under Utah water law as it existed up to 1935 isolated springs such as these were not considered to be public waters subject to appropriation, but were privately owned by the owner of the land on which they arose (see discussion supra at pp. 12-16). The same principles applied to percolating groundwater. At the time of the Decree, isolated springs and percolating waters were not part of the appropriation doctrine and could not be relied on as a source for downstream appropriative rights even if they were in fact hydrologically connected (via the underground) to the Weber River. So Appellants' artificial distinction between percolating water that momentarily flows on the surface (i.e., isolated springs) and normal percolating groundwater takes you nowhere and makes no sense, especially where Appellants assert the distinction to bring such water sources within the purview of the Weber River Decree.

Appellants cite several cases on page 14 of their brief for the proposition that (1) downstream appropriators have a right to rely on all sources (surface and underground) above their point of diversion and (2) there is a presumption that all surface and underground sources are tributary to the drainage in which they are geographically located. While we have no general disagreement with the holdings of the cases cited by Appellants, they are simply inapplicable to the issue to be decided here. Again, the law prior to 1935 was that groundwater and isolated springs were privately owned and were not subject to the appropriation doctrine or the priority system. Again, that is why not one underground water

right is addressed or mentioned in the Weber River Decree. Thus, whether or not the Kamas Hills Springs contributed to a percolating groundwater aquifer reaching the Weber River was totally irrelevant under the law as it existed prior to 1935.

For example, the lengthy quote from the 1935 case of Richlands Irrigation Co. v. Westview Irrigation Co., 80 P.2d 458 (Utah 1938), cited at page 14 of Appellants' brief regarding all sources feeding a senior appropriator's source of supply is certainly the law today. But that was not the law prior to 1935--at least not as to isolated springs and groundwater.

Further, Appellants offered no evidence to demonstrate that percolating underground water from the Kamas Hills Springs would reach the Weber River above their point of diversion, or at a time when Appellants were allowed to divert water. Thus, there is no demonstration of harm to Appellants. Nor is there any evidence that such water would reach the Weber River at a time when Appellants are entitled to divert.

Little Cottonwood Water Company v. Sandy City, 258 P.2d 440 (Utah 1953), (see Appellants' brief, p. 14), is inapplicable because it involved the appropriation process before the State Engineer and whether there was unappropriated water in Little Cottonwood Creek--a totally different situation than this case.

The arguments and citations in Point II of Appellants' brief further confuse issues of interference with the issue of whether isolated springs were or could have been adjudicated by the Weber River Decree. The two concepts are totally separate.

Appellants argue throughout their brief that the use of the term "Weber River System" in the Weber River Decree defined the hydrologic system as including all subsurface sources feeding the Weber River, and that all such sources were adjudicated (see, e.g., Appellants' brief, pp. 12 and 15). If that were true, why are there no underground or well rights listed in the Decree? The fact is that in defining the "Weber River System", the court was setting forth the geographical boundaries of the adjudication, since the Ogden River and other selected tributaries were excluded (see Appendix A). The court did not intend the term "River System" to refer to the hydrologic system of water which feeds the Weber River. And, even if it did, we submit there would be no logical or common sense reason for the court to differentiate between percolating groundwater wells (which were clearly left out) and isolated springs, given the state of the law prior to 1935.

Let us again make clear the position of the State Engineer. If a spring or other source of water was surface tributary to the Weber River, it was "public water" under the pre-1935 law; it was subject to the appropriation doctrine and it was covered by the Weber River Decree. If the water source was not surface tributary, under the pre-1935 law it was privately owned; it was not covered by the Decree, and it could not have been legally relied upon as a source of supply by downstream senior appropriators.[10] The law as it exists today cannot be superimposed back to 1935 retroactively

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[10] We, of course, acknowledge that all of this changed in 1935.

to bar claims to the use of water which were, prior to 1935, under a different legal regime.

The key to this case is whether or not the Kamas Hills Springs were surface tributary. Since Appellants have conceded that the springs are not surface tributary to the Weber River, the lower court's finding that the evidence did not support a finding that the springs were not tributary in any sense (surface or underground) is simply irrelevant.[11]

## CONCLUSION

For the reasons stated above, we urge the Court to affirm the judgment of the court below.

Respectfully submitted this 1st day of June, 1992.

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[11] As already noted, in its oral ruling the trial court did find that the springs were not surface tributary (Tr. Vol. 3, p. 5).

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of June, 1992, four true and correct copies of the BRIEF OF APPELLEE UTAH STATE ENGINEER were served by mailing the same, first class postage prepaid, addressed as follows:

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rights numbered 191, 232, 221 and 241 are to be maintained at a total of 8 second feet until the flow of the creek reaches 12 second feet, after which time, as the flow of the Creek diminishes, two-thirds of the flow is to go to rights numbered 191, 232, 221 and 241, and the remaining one-third of the flow to rights numbered 140, 167, 209, 219 and 238.

(f) That Union Pacific Railroad Company, No. 211, Morgan City Corporation No. 256, and the Utah Packing Corporation No. 257 may, at times when the direct flow of the Robinson Springs is not being used by the owners thereof, store the excess water of the Robinson Springs in a reservoir which is already constructed and now owned by them, for the purpose of permitting the owners of these rights a draft therefrom in excess of the continuous flow hereinafter set out to them in the Tabulation of water rights.

(g) Nothing herein contained shall prejudice the rights of George J. Stahle in the contest now pending herein between the said Stahle and A. L. Hurley and Rhea Hurley, his wife, their final rights to be determined by a final decree in said pending protest proceedings, provided, however, said decree shall in no wise affect any other rights or priorities than those of the said Stahle and the said Hurleys.

14. That the expenses incurred in the preparation of the findings of fact, conclusions of law and judgment and decree herein and the printing of the same as determined by the committee, petitioners herein, and approved by the court, shall be assessed against the persons, firms, associations or corporations entitled to the use of the water of said system, as set out in the findings of fact and the judgment and decree herein, in proportion to their rights as therein set out, upon the same basis as the expenses of the distribution of the water of said system are assessed by the State Engineer, and such expenses shall be and constitute a first lien upon said water rights until paid, and if the same are not paid within three months after the entry of the judgment and decree herein and the tabulation thereof, with the approval of the court, and the mailing of notices of such assessment, the same shall be sold by the Sheriff of Weber County as upon execution, except that there shall be no right of redemption, and the balance, if any, of the proceeds of sale, after paying such expenses, shall be delivered by the Sheriff to the owners of said rights.

## CONCLUSIONS OF LAW

As conclusions of law from the foregoing facts and the stipulation of all the claimants to the right to the use of water of said Weber River System, other than the users upon the Ogden River above its junction with the Weber River and also other than those users who have rights upon the tributaries and streams which flow into the Weber River from the north side below said junction, and wherever herein the term Weber River System is used it shall be construed to mean and does mean said system as above limited, the court makes and files the following conclusions of law:

1. That all of said claimants are entitled to the judgment and decree of this court, that each of them is entitled to use the water as set out in the tabulation of water rights of Weber River and tributaries, as hereinafter set out, subject to the limitations set out in paragraphs numbered 7, 8, 9, 10 11, 12 and 13 and all of the subdivisions of any of said paragraphs, of the findings of fact herein.

2. That each of the users entitled to use the water of said Weber River System, as set out in said Tabulation hereinafter made, and all persons, firms, associations, and corporations claiming by, under or through them and their agents, servants and employees, and all other persons, firms, associations and corporations be perpetually enjoined and restrained from using any of the waters of said system, as herein adjudicated, except as therein set out, and as limited by said findings of fact numbered 7, 8, 9, 10, 11, 12 and 13, and all of the subdivisions of any of said paragraphs of the findings of fact herein, and from interfering with the use of any of the water of said Weber River System, as hereinbefore set out, which any other user is entitled to use, as set out in said Tabulation and as limited by said findings of fact numbered 7, 8, 9, 10, 11, 12 and 13 and all of the subdivisions of any of said paragraphs of the findings of fact herein.

3. That the expenses incurred in the preparation of the findings of fact conclusions of law and judgment and decree herein and the printing of the same as determined by the committee, petitioners herein, and approved by the court, shall be assessed against the persons, firms, associations or corporations entitled to the use of the water of said system, as set out in the findings of fact and the judgment and decree herein, in proportion to their rights as therein set out, upon the same basis as the expenses of the distribution of the water of said system are assessed by the State Engineer, and such expenses shall be and constitute a first lien upon said water rights, until paid, and if the same are not paid within three months after the entry of the judgment and decree herein and the tabulation thereof, with the approval of the court, and the mailing of notices of such assessment, the same shall be sold by the Sheriff of Weber County as upon execution, except that there shall be no right of redemption, and the balance, if any, of the proceeds of sale, after paying such expenses, shall be delivered by the Sheriff to the owners of said rights.

Dated June 2nd, 1937.

LESTER A. WADE,
Judge.

## JUDGMENT AND DECREE

And the court having made and filed its decision in writing, wherein the findings of fact and conclusions of law are separately stated, upon said findings of fact and conclusions of law and the stipulation of all the claimants to the right to the use of water of said Weber River System other than the users upon the Ogden River above its junction with the Weber River and also other than those users who have rights upon the tributaries and streams which flow into the Weber River from the north side below said junction, and wherever herein the term Weber River System is used it shall be construed to mean and does mean said system as above limited:

IT IS ORDERED, ADJUDGED AND DECREED:

1. That in accordance with Chapter 67, Laws of Utah, 1919, as amended, all the proceedings have been had in this action and all the steps have been taken to enable the court to finally adjudicate all the rights to the use of water of said system.

2. That the parties hereto and as set out in the Tabulation of Water Rights of Weber River and Tributaries, hereinafter made herein, and hereby referred to and by this reference made a part hereof, are all those entitled to the right to the use for any purpose of water from the Weber River System, other than the users upon the Ogden River above its junction with the Weber River and also other than those who have rights upon tributaries or streams which flow into the Weber River System from the north side below said junction, and wherever herein the term "Weber River System" is used, it shall be construed to mean and does mean said system as above limited.

3. That as a means of studying the rights of the users of the water of the Weber River System, and as set forth in said Proposed Determination, the water

users have made three divisions of the River System,—the Upper Weber River, the Central Weber River and the lower Weber River; that a general committee of five members, chosen by the three divisions, with the Water Commissioner as secretary, has formed and does now form what is known as the Weber River Adjudication Committee, which committee represents, has acted for and now acts for the entire Weber River System, in all matters pertaining to the operation of said Proposed Determination.

4. That on March 11, 1935, the Central Division at Morgan, on March 12, 1935, the Upper Division at Oakley, and on April 10, 1935, the Lower Division at Ogden, the water users met in regularly called meetings, at which times proposed changes in and modifications of the State Engineer's Proposed Determination as heretofore set out herein were discussed and unanimously approved.

5. That the State Engineer's Proposed Determination of the water rights of the Weber River System was modified and revised in many instances and particulars by the orders of this court made in this matter on June 30, 1931, August 4, 1933, and June 27, 1935.

6. That sufficient trial periods have now been had to enable the court, except as hereinafter specifically stated, to make and enter a final decree adjudicating all the rights to the use of the waters of the said System and in accordance with said Proposed Determination, as modified and revised in accordance with the modifications and revisions thereof, which have heretofore been made in accordance with the orders of the court above set out and have since been made as set out in said petition and as hereinafter specifically set out, and that it is to the best interests of all the water users of said system that the court make and enter its final decree herein, in accordance with said Proposed Determination, as modified and revised, as hereinafter specifically set out, and in accordance with the decrees as to particular rights made and entered in this cause since its commencement, and in accordance with the decree made and entered by the District Court of the United States for the District of Utah, Northern Division, in the cause entitled Ogden City, a municipal corporation, vs. Union Pacific Railroad Company, in Equity No. 278, as hereinafter set out.

7. That in the Tabulation of Water Rights of Weber River and Tributaries hereinafter made herein, which said tabulation is hereby referred to and by this reference made a part hereof, is set out the number of each right to the use of the water of said system, as herein adjudicated, in the case of rights initiated since 1903 the number on which the application is based, in the case of rights which have been perfected since 1903 the number of the certificate which has been issued evidencing such right, the date of priority, the name of the owner of the right, and the name of the ditch through which the water represented by the right is diverted, the point of diversion, by section, township and range (for a more particular description of the point of diversion reference is hereby made to the statements of the respective claimants on file herein), the period of use, the purpose of the use of the right, in the case of water used for the purpose of irrigation, the section of the land irrigated, and the number of acres irrigated, the water allotment of the right in second feet in "Flood," "High," and "Low" water, with such reference and remarks as will clarify the nature and extent of the right and its relation to other rights on the said system.

Note: The letters and figures preceding the number and other symbols in the column "Right No." are for reference only and are not to be construed to be any part of the number of the right.

That as used in said Tabulation wherein the "Water Allotments in Second Feet" are divided into three columns, designated "Flood," "High," and "Low." said terms shall be construed to and do refer to flood water rights, high water rights and low water rights and said terms are defined to have and shall be construed to have and do have the following meanings:

(a) Whenever during any period of time in any irrigation season there is only sufficient water or less, other than storage water, available in the said System to supply the "Low" water rights, the quantities of which are set out in the column designated "Low," such periods of time are hereby designated as and are low water periods, and said System during said periods is considered to be and is at low water stage. During such periods of low water, the maximum quantity of water, other than storage water, which any owner having a low water right, as set out in said Tabulation, has the right to use, is the quantity, other than storage water, stated in the column designated "Low," and the owners of said low water rights are entitled to use and have distributed to them such quantities of water available for use in such periods of low water as set out in subparagraph 8-A hereof, except as to certain rights, which are modified by paragraphs 11, 12, 13a, 13b, 13d and 13e hereof, and except as to any other rights to the use of water, the water to fulfill which is from springs or tributaries which, if shut off from supplying them, would not reach, and could not be beneficially used by any other owner of the right to use water, whose right is prior in point of time.

(b) Whenever during any period of time in any irrigation season there is sufficient water, other than storage water, available in said system to make up the difference, or any part thereof, between the quantity designated as "Low" in the columns opposite the names of the users as set out in said Tabulation, and the quantities of water set out in the columns designated as "High," such periods are hereby designated as and are high water periods, and the said System during said periods is considered to be and is at high water stage. The maximum quantity of water which any user having a high water right, designated in said Tabulation as "High," may use, if any, during a high water period of said System, is the quantity of water set opposite his name in the column of said Tabulation designated as "High." However, the owners of rights to "High" water, available for use and distribution, as above defined, are entitled to and shall have distributed to them such water, other than storage water, only in the order of their respective priorities, as set out in subparagraph 8-A hereof, except as to those owners of the right to use said "High" water, whose rights are modified by paragraphs 9, 10, 13a, 13b, 13d and 13e hereof, and except as to any other owners of the right to use said "High" water, the water to fulfill which is from springs or tributaries which, if shut off from supplying them, would not reach and could not be beneficially used by any other owners of the right to use said water, whose rights are prior in point of time.

(c) Whenever during any part of the irrigation season there is sufficient water, other than storage water, available in said System to make up the difference, or any part thereof, between the quantity of water designated as "High" in the column set opposite the names of the users in said Tabulation and the quantities of water designated as "Flood," such periods of time are hereby designated as flood water periods, and the said System during said periods is considered to be and is at flood water stage. The quantity of water, other than storage water, which any owner of the right to use flood water designated as "Flood" in said Tabulation, may use, if any, during a flood water period of said system, is the quantity of water set opposite his name in the column of said Tabulation designated as "Flood."

However, the owners of the right to use flood water, available for use and distribution, other than storage water, are entitled to use and shall have distributed to them such water only in the order of their respective priorities,

as set out in subparagraph 8-A hereof, except as to certain owners of such rights, whose rights are modified by paragraphs 13a and 13b hereof, and except as to those owners of the right to use such flood water, the water to fulfill which is from springs or tributaries which, if cut off from supplying them, would not reach and could not be beneficially used by other owners of the right to use said water, whose rights are prior in point of time.

(d) Whenever in said Tabulation the term "supplemental" is used, it shall be construed to mean and does mean that the owner of such right has an additional source of supply to fulfill his right, as therein set out, but in no case shall the water which is available for such right from its original source of supply and its additional source of supply (or either thereof) be more than the total amount which is set out in the "Flood," "High" and "Low" columns opposite his name in the respective periods of such water, as herein defined, except as to storage water, and except where the term is used in connection with rights Numbered 41 and 42, in which cases the term is to be construed to have and does have the meaning given it in the references in the columns so designated opposite said rights.

(e) The abbreviations of words and terms used in said Tabulation are to be construed to stand for and be in lieu of complete words or terms, as follows: Dom. for Domestic, Stk. for Stock, Irr. for Irrigation, Apprx. for Approximately, Sec. or Secs. for Section or Sections, T for Township, R for Range, N. for North, S. for South, E. for East, W. for West, Ac. Ft. for Acre Feet, Sec. Ft. for Second Feet, No. or Nos., # or #s for Number or Numbers.

8-A. That in order to conform to the best and most satisfactory practice, water to supply rights subsequent to March, 1903, shall be shut off before the supply to rights with earlier priorities than 1903 is diminished; flood water rights with earlier priorities than 1903 shall be shut off in order of priority until no flood water is being used before the high water rights shall be cut; and in the same manner all high water rights shall be shut off in order of priority, except as modified in paragraphs 9, 10, 13a, 13b, 13d and 13e hereof, before there is any diminution in the low water rights, and that when water is available only for the low water rights, it shall be shut off in accordance with the respective priorities of low water rights, except as modified in paragraphs 11, 12, 13a, 13b, 13d and 13e hereof.

In order to simplify the distribution of water, the State Engineer or other officer in charge of distribution of said System shall make, in his discretion, the respective reductions as far as practicable, in accordance with four general classes, which are set out as follows:

Class I, all rights with priorities up to and including the year 1875.
Class II, all rights with priorities from 1876 to 1890 inclusive.
Class III, all rights with priorities from 1891 to March 11, 1903, inclusive.
Class IV, all rights which were initiated by application to the State Engineer's office and whose priorities are subsequent to March 11, 1903.

B. That in as much as the amount of water available from the system varies from year to year as the precipitation varies, and therefore the period of beneficial use begins and ends at different times in each year, in all instances herein where the term "Irrigation Season" is used, it is hereby interpreted to mean that period each year between March 1st and November 1st during which water can be beneficially applied in the growing of agricultural crops on the particular land to which it is allocated, in accordance with duty and priority, as specified herein and in said Tabulation.

C. That wherever in said Tabulation water rights are shown as having a lower duty of water during flood or high water periods, as herein defined, than they have in the low period as herein defined, and those rights which are set out in paragraphs 9 and 10 hereof as having an extended period of use of high water, such rights are given a lower duty of water, or an extended use of high water, or both, as the case may be, in consideration of the benefit of the return flow therefrom to the river system from the lands irrigated by water covered by such rights, and in the event that the owners of such water rights shall sell, transfer or lease the same, either in whole or in part, for the purpose of being applied to lands which are included herein and are allotted a different duty of water, in accordance herewith, or to be applied to lands not included herein, which if included would have had, because of their character or location, a different duty of water, then and in that event such water rights so sold, transferred or leased shall continue to have the priority allotted thereto in this decree, but the duty of water applied to the lands to which said water rights have been so sold, transferred or leased shall be the duty of water applicable to such lands, if said lands are included herein, and if not then said lands shall have the duty of water as determined by the State Engineer, or other officer in charge of the distribution of the waters of said river system, and the use thereof shall be limited to the same number of acres to which said water was allotted, as set out in said Tabulation, provided, however, that in years of extreme drouth the State Engineer or other officer in charge of the distribution of said system may allow the temporary transfer or lease of said waters to other lands within said system, without this limitation being applicable to said transfer or lease.

D. That except as set out in said Tabulation, all claims to the right to the use of water of said System are forever barred, except as to such applications as have been or may hereafter be filed in the office of the State Engineer which have not, prior to January 8, 1937, been finally determined to be perfected rights, which, when and as they are finally determined to be perfected rights shall be added by supplemental decree to the rights herein adjudicated.

E. That the lands set out in said Tabulation are arid in character and without the application thereto of water for irrigation will not produce valuable crops, but with irrigation will produce valuable crops, and the use of water for the irrigation of said lands is necessary for such irrigation and the use of water for other purposes, as set out in said Tabulation, is necessary for such purposes, and that neither the State of Utah, nor any other person, firm, corporation, or association at the time of the entry hereof has any right to the use of the water of said System except as herein and as in said Tabulation set out, except such as may be finally adjudicated to be rights upon application to the State Engineer, and upon applications now pending in his office, but which have not yet been determined to be perfected rights, provided that if such applications should finally result in perfected rights, then they shall be added by supplemental decree to the rights herein adjudicated and set out in said Tabulation.

F. That whenever in said Tabulation users have the right to use water for irrigation purposes, such users shall also have the right to use domestic or stock water, or both, from the same sources of supply and with the same means of conveyance therefrom; the amount of domestic or stock water or both which they are entitled to use at all times when it is practicable to deliver the same is five per cent of their low water irrigation right, with the same priority as set out in said Tabulation, plus whatever seepage or other losses the State Engineer or other officer in charge of the distribution of said System may determine is necessary to deliver such domestic or stock water or both to the place of use through the now existing canals, ditches, pipe lines, etc., as the case may be, provided, however, that no domestic or stock water shall be allowed in any canal or ditch during the period of time when there is

# LAWS

OF

# THE STATE OF UTAH

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PASSED AT THE

THIRTEENTH REGULAR SESSION

OF

THE LEGISLATURE

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Convened at the Capitol in the City of Salt Lake,
January 13th, 1919,
and adjourned sine die on the 13th day
of March, 1919

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## CHAPTER 67.

Senate Bill No. 113. Compiled Laws, 1917, p. 724.
(Passed March 13, 1919. Approved March 13, 1919. In effect March 13, 1919.)

### WATER AND WATER RIGHTS.

**An Act defining general provisions concerning water and water rights, the appropriation, administration, adjudication and use of water and water rights, and repealing Chapters 1, 2, 3, and 4, Title 55, of the Compiled Laws of Utah, 1917, and all laws of Utah in conflict herewith.**

*Be it enacted by the Legislature of the State of Utah:*

SECTION 1. Ownership of water. The water of all streams and other sources in this State, whether flowing above or under the ground, in known or defined channels, is hereby declared to be the property of the public, subject to all existing rights to the use thereof.

Sec. 2. Standard of measurement. The standard unit of measurement of the flow of water shall be the discharge of one cubic foot per second of time, which shall be known as a second-foot; and the standard unit of measurement of the volume of water shall be the acre-foot, being the amount of water upon an acre covered one foot deep, equivalent to 43,560 cubic feet.

Sec. 3. Rights to the use. Beneficial use shall be the basis, the measure and the limit of all rights to the use of water in this State.

Sec. 4. Public use—rights of way—manner of exercise—acquisition. The use of water for beneficial purposes, as provided in this Act, is hereby declared to be a public use. Any person, corporation or association shall have a right of way across and upon public, private and corporate lands, or other right of way, for the construction, maintenance, repair, and use of all necessary reservoirs, dams, water gates, canals, ditches, flumes, tunnels or other means of securing, storing and conveying water for irrigation or for any necessary public use, or for

drainage, upon payment of just compensation therefor, but such right of way shall in all cases be exercised in a manner not unnecessarily to impair the practical use of any other right of way, highway or public or private road, nor unnecessarily to injure any public or private property. Such right may be acquired in the manner provided by law for the taking of private property for public use.

Sec. 5. Use of waterways already constructed—costs—time. When any person, corporation or association desires to convey water for irrigation or any other beneficial purpose, and there is a canal or ditch already constructed that can be used or enlarged to convey the required quantity of water, then such person, corporation or association, or the owner or owners of the land through which a new canal or ditch would have to be constructed to convey the quantity of water necessary, shall have the right to use or enlarge said canal or ditch already constructed, by compensating the owner of the canal or ditch to be used or enlarged, for the damage, caused by said use or enlargement, and by paying an equitable proportion of the maintenance of said canal jointly used or enlarged; provided, that said enlargement shall be done at any time from the 1st day of October to the 1st day of March, or any other time that may be agreed upon with the owner of said canal or ditch, and the additional water turned in shall bear its proportion of loss by evaporation and seepage.

Sec. 6. Nonuse—reappropriation. When an appropriator or his successor in interest abandons or ceases to use water for a period of five years, the right ceases, and thereupon such water reverts to the public, and may be again appropriated, as provided in this Act.

Sec. 7. State Engineer—qualifications—appointment—term—powers and duties—water districts. There shall be a State Engineer, who shall be appointed by the Governor by and with the advice and consent of the Senate. He shall hold his office for the term of six years and until his successor shall have been appointed and qualified. He shall have general administrative supervision of the waters of the State and of their measurement, appropriation, apportionment and distribution. He shall have power to make and publish such rules and regulations as may be necessary from time to time fully to carry out the duties of his office and particularly to secure the equitable and fair apportionment and distribution of the water according to the respective rights of appropriators. The State Engineer may establish water districts and define the boundaries thereof, said districts to be so constituted as to secure the best protection to the claimants of water, and the most economical supervision on the part of the State. No person shall be appointed to the office of State Engineer who has

not such theoretical knowledge and practical experience and skill as shall fit him for the position.

Sec. 8. Applications for change—notice—protests—grounds of decision—appeals. Any person, corporation or association, entitled to the use of water, may change the place of diversion or place of use and may use the water for other purposes than those for which it was originally appropriated, but no such change shall be made, if it impairs any vested right, without just compensation; no change of point of diversion, place or purpose of use shall be made except on the approval of an application of the owner by the State Engineer. Before the approval of an application the State Engineer must, at the expense of the applicant, to be paid in advance, give notice thereof by publication in some newspaper having general circulation within the boundaries of the river system or near the water source in which the point of diversion of the water is located; such notice shall give the name of the applicant, the quantity of water involved, the stream or source from which the appropriation has been made, the point on the stream or source where the water is diverted, the point to which it is proposed to change the diversion of the water, the place, purpose and extent of present use, and the place, purpose and the extent of proposed use. Said notice to be published at least once a week for a period of four weeks. Any person, corporation or association interested may, at any time within thirty days after the completion of the publication of said notice, file with the State Engineer a protest against the granting of said application for change of point of diversion, place or purpose of use, stating the reasons therefor, which shall be duly considered by the State Engineer, who shall approve or reject said application for change of point of diversion, place, or purpose of use. Such application shall not be rejected solely for the reason that such change would impair vested rights of others, but the application if otherwise proper may be approved conditionally upon such conflicting rights being acquired. The determination of the State Engineer shall be final unless appeal is taken to the district court within sixty days of written notice to applicant of action of the State Engineer. Any person holding an approved application for the appropriation of water may change the point of diversion, place or purpose of use under proceedings taken substantially as above set forth.

Sec. 9. Flow of appropriated waters—deterioration—share loss—costs. Upon application in writing and approval of the State Engineer, any appropriated water may be turned into the channel of any natural stream or natural body of water or into a reservoir constructed across the bed of any natural stream, and commingled with its waters, and then be taken out, either above or below the point where emptied into

the stream, body of water or reservoir, but, in so doing, the original water in such stream, body of water or reservoir must not be deteriorated in quality or disminished in quantity, and the additional water turned shall bear its share of loss by evaporation and seepage and of the maintenance of said reservoir, and an equitable proportion of the cost of the reservoir site and of the construction.

Sec. 10. **Priority of appropriations—preferences.** Appropriators shall have priority among themselves according to the dates of their respective appropriations, so that each appropriator shall be entitled to receive the whole supply to which his certificate entitles him before any subsequent appropriator shall have any right; provided, in times of scarcity, while priority of appropriation shall give the better rights as between those using water for the same purpose, the use for domestic purposes shall have preference over use for all other purposes, provided, that such use shall not involve unnecessary waste; and use for agricultural purposes shall have preference over use for any other purpose except domestic use.

Sec. 11. **Subscriptions or purchase of stock in similar corporations.** Any irrigation or reservoir company, incorporated and existing under the laws of this State, may purchase or subscribe for the capital stock of any other similar corporation which, at the time of such purchase or subscription, shall be or is about to be incorporated; provided, that such purchase or subscription shall be made only when permitted by the original articles of incorporation or by amendment thereto proposed and adopted according to law, and such corporations are hereby permitted and authorized to amend their articles of incorporation so as to authorize such purchase or subscription.

Sec. 12. **Maintenance—repairs—crossings.** The owner or owners of any ditch, canal, flume or other water course shall maintain the same in repair, so as to prevent waste of water or damage to the property of others. Such persons are required, by bridge or otherwise, to keep such ditch, canal, flume or other water course in good repair where the same crosses any public road or highway, so as to prevent obstruction to travel, or damage or overflow to such public road or highway, excepting at any place where the public maintains or may hereafter elect to maintain such devices.

Sec. 13. **Liabilities for use—actions for contribution.** When two or more persons, companies or corporations are associated by agreement or otherwise, in the use of any dam, canal, reservoir, ditch, lateral, flume or other means of conserving or conveying water for the irrigation of land or for other purpose, each of them shall be liable to the other for the reasonable expenses of maintaining, operating and con-

trolling the same, in proportion to the share in the use or ownership of the water to which he is entitled. If any person, company or corporation refuses or neglects to pay his proportion of such expense, after five days' notice in writing demanding such payment, he shall be liable therefor in an action for contribution.

Sec. 14. **Appurtenant lands—transfer of rights—recording.** All water hereafter appropriated for irrigation purposes from works constructed or controlled by the United States shall be appurtenant to specified lands owned or occupied by the person claiming the right to use the water, so long as the water is used beneficially thereon; provided, that if for any reason it should at any time become impracticable to use water beneficially or economically for the irrigation of any land to which the right of the same is appurtenant, said right may be severed from said land, and simultaneously transferred, and become appurtenant to other land, without losing priority of right theretofore established, if such change can be made without detriment to existing rights; and in case of such change, the owner of such water right shall execute and acknowledge a proper instrument of transfer describing therein the land from and to which such water is transferred, which instrument shall be recorded in the County Recorder's office of the county in which the land is situated.

Sec. 15. **Use passes to grantee of land—succession—payment of assessments—reservations.** A right to the use of water appurtenant to the land shall pass to the grantee of such land, and, in cases where such right has been exercised in irrigating different parcels of land at different times, such right shall pass to the grantee of any parcel of land on which such right was exercised next preceding the time of the execution of any conveyance thereof; subject, however, in all cases to payment by grantee of any such conveyance of all amounts unpaid on any assessment then due upon any such right; provided, that any such right to the use of water, or any part thereof, may be reserved by the grantor in any such conveyance, by making such reservation in express terms inserted in such conveyance, or may be separately conveyed.

Sec. 16. **Transfers by deed—recording—imparting notice.** Water rights shall be transferred by deeds, in substantially the same manner as real estate, except when they are represented by shares of stock in a corporation, and such deeds shall be recorded in books kept for that purpose in the office of the recorder of the county where the place of diversion of the water from its natural channel is situated, and in the county where the water is applied. Every deed of water right so recorded shall, from the time of filing the same with the recorder for record, impart notice to all persons of the contents thereof, and subse-

quent purchasers, mortgagees and lien holders shall be deemed to purchase and take with notice.

Sec. 17. Rights of subsequent purchasers. Every deed of water right within this State hereafter made, which shall not be recorded as provided in this Act, shall be void as against any subsequent purchaser in good faith, and for a valuable consideration, of the same water right, or any portion thereof, where his own deed shall be duly recorded.

Sec. 18. Liability for interference. Any person, corporation or association who shall in any way unlawfully interfere with, injure, destroy or remove any dam, headgate, weir, or other appliance for the diversion, apportionment or measurement of water, or who shall interfere with any of the persons authorized by this Act to apportion water, while in the discharge of their duties, shall be guilty of a misdemeanor, and shall also be liable in damages to any person injured by such unlawful act.

Sec. 19. Obstructions. Whenever any person, corporation or association has the right of way for any canal or other water course, it shall be unlawful for any person to place or maintain in place any obstruction, by fence or otherwise, along or across such canal or water course, without providing gates sufficient for the passage of the owner or owners of such canal or water course or their agents. Any person, corporation or association violating the provisions of this Section shall be guilty of a misdemeanor.

Sec. 20. Determination of rights. Upon a verified petition to the State Engineer, signed by five or more water users upon any stream or water source, requesting the determination of the relative rights of the various claimants to the waters of such streams or water source, it shall be the duty of the State Engineer, if upon investigation he finds the facts and conditions are such as to justify, to make a determination of said rights, fixing a time for making such examination and taking such testimony as will enable him to determine the rights of the various claimants, provided that if 25 or more or a majority of the water users on any stream if there be less than 25, so petition, then the State Engineer shall proceed as in this Section provided for.

Sec. 21. Action begun—contents. When the State Engineer has completed the survey of any river system or water source, he shall bring an action in the district court and shall file a written statement with the clerk of the district court, setting forth the fact of the completion of such survey, the names and postoffice addresses of all persons, corporations and associations using water from said river sys-

tem or water source, so far as the same are known to the State Engineer, and containing such other facts and information as he may deem necessary.

Sec. 22. **Statement as to water users—publication of notice—date as to survey—claims—field investigations.** Upon the filing of any suit for the determination of water rights, the clerk of the district court shall notify the State Engineer that such suit has been filed. Whereupon the State Engineer shall, as expeditiously as possible, prepare and file with the court a statement giving the names and addresses of all the claimants to the use of water from the river system or water source involved in such action, so far as the said claimants are known; and to this end the clerk of said court shall publish, once a week for two consecutive weeks in a newspaper designated by said clerk as most likely to give notice to such claimants, a notice setting forth that such a petition has been filed, naming or describing the river system or water source involved and requiring claimants to the use of water therefrom to notify the State Engineer of their names and addresses for the purposes hereinafter set forth. When such statement shall have been filed or when the clerk of said court shall have ascertained as nearly as may be the names of all claimants, said clerk shall within fifteen days prepare a notice setting forth the date when the State Engineer will begin the survey of the system or water source and the ditches diverting water therefrom, or the fact that such survey has already been completed, as the case may be, and also giving notice that such claimants must within sixty days of the service of such notice file a written statement with the clerk of said court, setting forth their respective claims to the use of such water. Where such a suit shall have been filed, it shall be the duty of the State Engineer upon receiving notice thereof to examine the records of his office with respect to the water system or water source involved, and if they are incomplete, to make such field investigations as may be necessary for the preparation of the report required by Section 28 hereof.

Sec. 23. **Service of notice—when effective—forms for answer.** Such notice requiring each claimant to file such statement shall serve as a summons in such action, and shall be served as a summons issued by a district court, personally upon each known claimant, and shall also be published five times, once each week for five successive weeks, in a newspaper or newspapers designated by the judge of said court as most likely to give notice to the persons served. The clerk of said court shall on or before the date of first publication also mail, by registered letter to each of the persons, corporations and associations as are known, a copy of said notice, and a blank form on which said claimant shall present in writing, as provided in the next succeed-

ing section, all the particulars relating to the appropriation of the water of said river system or water source to which he lays claim. The service of notice is complete when personal service is had, or, when it is not had, on the expiration of the thirtieth day after the first publication of such notice.

Sec. 24. **Time for filing and contents of statement.** Each person, corporation or association claiming a right to use any water of said river system or water source shall, within sixty days after the service of such notice mentioned in the preceding section, file in the office of the clerk of the district court, a statement in writing which shall be signed and verified by the oath of the claimant, and shall include as near as may be the following: The name and postoffice address of the person, corporation or association making the claim; the nature of the use on which the claim of appropriation is based; the flow of water used in cubic feet per second and the time during which it has been used each year; the name of the stream or other source from which the water is diverted, the place on such stream or source where the water is diverted, and the nature of the diverting works; the date when the first work for diverting the water was begun, and the nature of such work; the date when the water was first used, the flow in cubic feet per second, and the time during which the water was used the first year; and the place and manner of present use; and such other facts as will clearly define the extent and nature of the appropriation claimed, or as may be required by the blank form, which shall be furnished by the State Engineer under the direction of the court.

Sec. 25. **Irrigated land—area—location—soil—crops.** If the water claimed to have been appropriated is used for irrigation, the statement shall show, in addition to the facts required by Section 24 hereof, as nearly as possible the area of land irrigated the first year and each subsequent year; the total area at present irrigated, and its location in each section, township and range wherein it is situated; the character and depth of the soil and the kind of crops raised and maximum and minimum acreage irrigated during total period of use.

Sec. 26. **Water power—amount—purpose—place.** If the water claimed to have been appropriated is used for developing power, the statement shall show in addition to the facts required by Section 24 hereof, the number, size and kind of water wheels employed; the head under which each wheel is operated; the amount of power produced, and the purposes for which and the places where it is used; and the point where the water is returned to the natural stream or source.

Sec. 27. **Milling or mining—district—material.** If the water claimed to have been appropriated is used for milling or mining, the statement

shall show, in addition to the facts required by Section 24 hereof, the name of the mill and its location, or the name of the mine and the mining district in which it is situated; the nature of the material milled or mined, and the place where the water is returned to the natural stream or source.

Sec. 28. **Tabulation of facts—report—recommendation by engineer.** Within thirty days after the expiration of the sixty days allowed for filing statements or claims, the State Engineer shall begin to tabulate the facts contained in the statements filed, and to investigate, wherever he shall deem necessary, the facts set forth in said statements, with reference to the surveys already made or by further surveys, and shall, as expeditiously as possible, make a report to the court with his recommendation of how all rights involved shall be determined.

Sec. 29. **Effect of statement—failure to make operates as a bar—proviso as to actual notice.** The filing of each statement by a claimant shall be considered notice to all persons, corporations and associations of the claim of the party making the same, and any person, corporation or association failing to make and deliver such statement of claim to the clerk of the court within the time prescribed by law shall be forever barred and estopped from subsequently asserting any rights and shall be held to have forfeited all rights to the use of said water theretofore claimed by him; provided, however, that any claimant upon whom no other service of said notice shall have been made than by publication in a newspaper may apply to the court for permission to file a statement of claim after the time therefor has expired, and the court may extend the time for filing said statement, not exceeding six months from the first publication of said notice; but, before said time is extended, the applicant shall give notice by publication in a newspaper having general circulation on said river system or near the water source, to all other persons, corporations or associations interested in the water of that river system or water source, and shall make it appear to the satisfaction of the court that during the pendency of the proceedings he had no actual notice thereof in time to appear and file a statement and make proof of his claim; and all parties interested may present affidavits as to the matter of his actual notice of the pendency of such proceedings.

Sec. 30. **Statements in lieu of pleadings—investigators of facts—competent evidence.** The statements filed by the claimants shall stand in the place of pleadings, and issue may be made thereon. Whenever requested so to do the State Engineer shall furnish the court with any information which he may possess, or copies of any of the records of his office which relate to the water of said river system or water source. The court may appoint referees, masters, engineers, soil

specialists or other persons, as necessity or emergency may require, to assist in taking testimony or investigating facts, and in all proceedings for the determination of the rights of claimants to the water of a river system or water source, the statements of claimants, maps, records and reports of the State Engineer, other engineer, soil specialist or person appointed by the court, shall be competent and prima facie evidence of the facts stated therein or delineated thereon.

Sec. 31. **Amendments—extension of time.** The court shall have power to allow amendments to any petition, statement or pleading; to extend as provided in this Act the time for filing any statement of claim; and to extend, upon due cause shown, the time for filing any other pleading, statement, report or protest.

Sec. 32. **Proposed determination of rights—notice of same—objections temporary distribution of water—proviso.** After full consideration of the statements of claims, the surveys, records and files and after a personal examination of the river system or water source involved, if such examination is deemed necessary, the State Engineer shall formulate a proposed determination of all rights to the use of the water of such river system or water source, and a copy of such proposed determination shall be mailed by regular mail to each claimant, with notice that any claimant dissatisfied with such determination may within ninety days from such date of mailing file with the clerk of the district court a written objection thereto duly verified on oath. The State Engineer shall distribute the waters in accordance with said proposed determination until a final decree is rendered by the court, or until the court shall instruct him otherwise. Provided, that the right to the use of said waters have not been theretofore decreed or adjudicated, but if formerly decreed and adjudicated, said waters shall be distributed in accordance with such decree until the same be reversed, modified, vacated, or otherwise legally set aside.

Sec. 33. **Judgment on proposed determination.** If no contest on the part of any claimant or claimants shall have been filed, the court shall render a judgment in accordance with such proposed determination which shall determine and establish the rights of the several claimants to the use of the water of said river system or water source; and among other things shall set forth the name and postoffice address of the person, corporation or association entitled to the use of the water; the quantity of water in acre-feet or the flow of water in second-feet; the time during which the water is to be used each year; the name of the stream or other source from which the water is diverted; the place on the stream or other source where the water is diverted; the priority date of the right; and such other matters as

will fully and completely define the right of said person, corporation or association to the use of the water.

Sec. 34. Procedure in case of objections. If any contest or objection on the part of any claimant or claimants shall have been filed, as in this Act provided, the court shall give not less than fifteen days' notice to all claimants, stating when and where testimony will be taken, provided that such testimony shall be taken in the county in which said action is pending. The court may grant adjournments from time to time as occasion may require.

Sec. 35. Judgment after hearings. Upon the completion of the hearing, after objections filed, the court shall enter judgment which shall determine and establish the rights of the several claimants to the use of the water of the river system or water source as provided in Section 33 of this Act.

Sec. 36. Right of appeal—record—procedure and practice. From all final judgments of the district court there shall be a right of appeal to the supreme court. The appeal shall be upon the record made in the district court; and may as in equity cases be on questions of both law and fact. All proceedings on appeal shall be conducted according to the provisions of the code of civil procedure, and the practice on appeals from the district court to the supreme court.

Sec. 37. Certificates of award—filing and record—effect. If no appeal is taken from said judgment within six months after the same has been entered, or, if the case is appealed, within thirty days after the final judgment on appeal is entered, it shall be the duty of the clerk of the district court to issue to each person, corporation or association having been awarded the use of water by said judgment, a certificate in triplicate attested under the seal of the court, setting forth the determination of said water right, as specified in Section 33. Three copies of said certificate shall be transmitted, in person or by registered mail, to the appropriator, who shall, within thirty days, have one of the same recorded in books especially provided for that purpose in the office of the county recorder of the county in which the water is diverted from its natural channel, one in the county where the water is applied, and the other shall be delivered to the State Engineer, and filed in his office as part of the records thereof. Said certificate shall supersede any certificate thereon issued by the State Engineer.

Sec. 38. Determination of rights in river systems—the State a necessary party. Whenever any civil action is commenced in the district court involving the use of water from any river system or water source, the court, in its discretion, may, if a general determination

of the rights to the use of water from said river system or water source has not already been made, proceed, as in this Act provided, to make such a general determination. In any action for the determination of water rights the State of Utah shall be joined as a necessary party.

Sec. 39. **Report in case of waste—action by Engineer—re-determination.** Whenever any person or user of water from any river system or water source believes that there is a waste of water from said river system or water source, said person or user of water may report the matter to the State Engineer or may petition the district court for the investigation of such alleged waste; whereupon the State Engineer may make an investigation and report his findings to said court of such alleged waste or said court may order or make such an investigation, and if such investigation warrants may proceed to make a determination, if such has not yet been had, or a re-determination, in whole or in part, of the rights to the use of the water from said river system or water source.

Sec. 40. **Bond on action for re-determination—liability of claimant.** Wherever a general determination of water rights upon any river system or water source has been made by the district court, any claimant to the use of water from said river system or water source seeking a re-determination of water rights upon such river system or water source shall, before commencing any action for such re-determination or for the revision of any final judgment other than as provided in Section 21 hereof, furnish to the court in which said action is commenced and before the filing of any petition or complaint for such purpose, a good and sufficient bond, in a form and with sureties approved by the court, in a sum fixed by the court, and at least equal to twice the estimated costs which may arise in said action; and if final judgment after hearing, or after appeal, should appeal be taken, should be awarded against such claimant, then such claimant shall be liable for the payment in full of all costs arising in such action and for all damages to other parties to said action arising therefrom.

Sec. 41. **Acquisition of the right of use—purpose—order—more beneficial use.** Rights to the use of the unappropriated public water in the State may be acquired by appropriation, in the manner hereinafter provided, and not otherwise. The appropriation must be for some useful and beneficial purpose, and, as between appropriators, the one first in time shall be first in right; provided, that when a use designated by an application to appropriate any of the unappropriated waters of the State would materially interfere with a more beneficial use of such water, then the application shall be dealt with as provided in Section 48 hereof.

## VIII.

Certain lands in this State have enjoyed some benefits from the application of water thereto by other than diversion from natural channels or sources, such for instance, as natural swamps or meadow lands watered from over flow, seepage water, etc.

The Statutes appear not to point the way sufficiently to enable the State Engineer certainly to determine water rights with respect to these classes of lands and no determination, therefore, is made with respect to them. The tabulation separately shown hereafter shows facts as to these lands and water uses, such as dates of priority, points of collection, general location and such other data as may enable the court to determine the status of these uses.

The services of the State Engineer, if necessary, will gladly be given to assist the court in arriving at its conclusions.